

Appeal No. SC92961

IN THE SUPREME COURT OF MISSOURI

LINCOLN SMITH, ET AL.,

Appellants/Cross-Respondents,

vs.

BROWN & WILLIAMSON TOBACCO CORP.,

Respondent/Cross-Appellant.

On Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit
The Honorable Marco Roldan

SUBSTITUTE REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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STATEMENT OF ISSUES

Plaintiffs' response brief leaves unanswered Brown & Williamson Tobacco Corporation's ("B&W") core contention that the evidence at the second trial contradicted the only theory upon which the first jury could have based a punitive damages verdict for strict liability product defect under the Court of Appeals' first decision. The Court of Appeals found that Plaintiffs' strict liability product defect claim was submissible for punitive damages only after concluding that Plaintiffs' evidence in the first trial "went beyond a categorical attack on the danger of cigarettes in general" and instead "demonstrated specific design choices by B&W that had the potential to affect [Barbara] Smith's health during the time period she smoked." *Smith v. Brown & Williamson Tobacco Corp.* ("Smith I"), 275 S.W.3d 748, 796 (Mo. App. W.D. 2009). At the second trial, however, as B&W illustrated in its opening brief, Plaintiffs' expert witnesses openly disavowed any suggestion that the Kool cigarettes Ms. Smith smoked were more dangerous than other cigarettes.

Rather than deny or attempt to explain that inconsistency, Plaintiffs inundate this Court with references to several hundreds of pages of testimony that discuss specific characteristics of Kool cigarettes but do not contain a single statement or exhibit explaining how those characteristics made Kool cigarettes any more dangerous than other cigarettes. Moreover, Plaintiffs attempt to distract this Court (as they did the second jury) with evidence that relates only to claims and issues that were not part of the Court of Appeals' limited remand. Indeed, even though much of the evidence at the first trial was introduced to support four theories of liability—fraudulent concealment, conspiracy,

negligent failure to warn, and negligent design—that were excluded from the limited second trial that the Court of Appeals ordered, Plaintiffs repeatedly and emphatically insist that they presented the *same* evidence at the second trial as at the first. In doing so, Plaintiffs effectively concede that the bulk of the evidence they presented at the second trial had nothing to do with strict liability product defect, let alone with whether Kool cigarettes are somehow more dangerous than other cigarettes.

Because Plaintiffs' own experts during cross examination rejected the theory that Kool cigarettes are more dangerous than other cigarettes, Plaintiffs failed to make a submissible case for punitive damages for two reasons. First, they did not present clear and convincing evidence of aggravating circumstances with respect to the same conduct for which B&W had been found liable, as their evidence either expressly contradicted the theory they relied upon in the first trial or was irrelevant to strict liability product defect (and could not support punitive damages under the previous findings of the first jury and the Court of Appeals). Second, because they did not prove that Kool cigarettes are more dangerous than ordinary cigarettes, they were left with a punitive damages theory that is preempted by federal law, which precludes imposing punishment based on nothing more than the manufacture and sale of ordinary cigarettes.

Accordingly, the trial court erred by denying B&W's motion for judgment notwithstanding the verdict.

ARGUMENT

I. PLAINTIFFS FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE OF AGGRAVATING CIRCUMSTANCES BASED ON THE SAME CONDUCT FOR WHICH THE FIRST JURY COULD HAVE FOUND B&W LIABLE. (CROSS-APPEAL POINT I)

As set forth in B&W's opening brief, Plaintiffs were required to prove something very specific to make a submissible case for punitive damages at the second trial. Because the Court of Appeals concluded in its first opinion that the only permissible basis upon which the first jury could have found B&W liable for punitive damages for strict liability product defect was that Kool cigarettes are more dangerous than "ordinary" cigarettes, *see Smith I*, 275 S.W.3d at 796, Plaintiffs needed "to present clear and convincing evidence of aggravating circumstances based on the same conduct" of manufacturing and selling cigarettes that were somehow more dangerous than ordinary cigarettes. B&W Substitute Br. 20; *see also White v. Ford Motor Co.*, 500 F.3d 963, 975 (9th Cir. 2007) (reversing punitive damages verdict where "the jury may not have been focused properly on the conduct actually found culpable by the first jury").

Plaintiffs do not dispute that basic legal principle. To the contrary, they repeatedly emphasize throughout their substitute response brief that "punitive damages liability is directly and necessarily tied to the underlying strict liability product defect . . . jury verdict affirmed by the appellate court," and that any proper "retrial on punitive damages must be based on *the same conduct* . . . that established the underlying strict liability product defect." Pls.' Response Br. 7, 8 (emphasis in original); *see also* Pls.' Response

Br. 8 (“[t]he appellate court reversed for a new jury to determine whether the conduct of Brown & Williamson, *that gave rise to the affirmed finding of strict liability product defect*, was reckless and indifferent sufficient to impose punitive damages liability” (emphasis added)).¹ Plaintiffs fail to grasp the consequence of their own legal admissions, however, for they make absolutely no attempt to respond to B&W’s core argument that they failed to prove—indeed, disavowed—the only theory on which a jury could have found B&W liable for punitive damages after the Court of Appeals’ first decision in this case.

Specifically, Plaintiffs ignore altogether the testimony of their own expert witnesses expressly disavowing the purported premise of the first jury’s strict liability product defect verdict, namely, that Kool cigarettes are more dangerous than other cigarettes. *See* B&W Substitute Br. 13. For instance, in an attempt to demonstrate some relationship between the first jury’s liability verdict and the second jury’s punitive

¹ To be clear, that principle holds true only with respect to *liability* for punitive damages. B&W does not agree with Plaintiffs’ erroneous assertion that the same limitation applies once a jury has already found a defendant liable for punitive damages and has moved on to determining what amount of punitive damages is appropriate. Missouri law makes clear that the second phase of a bifurcated punitive damages trial is not confined to the evidence that established liability. *See* § 510.263.3, R.S.Mo. (2000) (evidence of defendant’s net worth admissible only during second phase of bifurcated punitive damages trial).

damages verdict, Plaintiffs reference testimony from Dr. Burns “regarding the distinctive characteristics of Kool cigarettes, including the unique blend, the presence of menthol and high level of menthol.” Pls.’ Response Br. 26. But Plaintiffs then ignore Dr. Burns’s admission that menthol does not make cigarettes any more dangerous. *See, e.g.*, T. 1200–01, 1241–42, B&W App. A7, A10. Similarly, Plaintiffs note that Dr. Burns “told the jury . . . that Kool cigarettes were defective and unreasonably dangerous.” Pls.’ Response Br. 26. But they fail to mention that he testified that “all conventional cigarettes—and by that we mean cigarettes that burn tobacco—are unreasonably dangerous and defective.” T. 1203, B&W App. A7. Indeed, when presented with a whole array of cigarettes, each with its own unique design and properties, Dr. Burns could not identify a single cigarette that he did not consider defective. T. 1213–18, B&W App. A8-A9.

And Dr. Burns did not stop with disavowing at a general level the only theory open to Plaintiffs. He quite specifically conceded that each and every one of Plaintiffs’ arguments for why Kool cigarettes are unreasonably dangerous applies equally to all other types of cigarettes. For instance, Dr. Burns testified:

- “There is no existing scientific evidence that allows us to differentiate the lung cancer risk for different brands at this point in time” (T. 1214, B&W App. A8)
- “We don’t have any evidence that any of these cigarettes pose a lower risk of heart disease than Kool.” (T. 1215, B&W App. A8)

- “We do not have any scientific evidence that allows us to differentiate between brands as to their chronic obstructive lung disease risk” (T. 1216, B&W App. A9)
- “We don’t have any scientific evidence that allows us to differentiate between brands in terms of the occurrence of Peripheral Vascular Disease” (T. 1217, B&W App. A9)
- “We don’t have any scientific evidence that allows us to differentiate between brands as to their risk of causing a heart attack.” (T. 1217, B&W App. A9)
- “Q. The presence or absence of menthol in a cigarette does not make a cigarette unreasonably dangerous or not, does it, sir? A. No. As I’ve testified, all cigarettes are unreasonably dangerous. * * * It is not the menthol that makes the cigarette unreasonably dangerous.” (T. 1237–38)

These admissions, all of which were made during cross-examination, rendered Dr. Burns’s testimony at the second trial fundamentally different from his testimony at the first trial, and eviscerated the only theory on which the second jury could have validly based a punitive damages verdict after the Court of Appeals’ first decision, namely, that Kool cigarettes are more dangerous than other cigarettes. *See also* T. 1911–12, B&W App. A12 (Dr. Wigand: “There will never be a safe cigarette or a safer cigarette on the market.”).

B&W set forth Dr. Burns’s damaging admissions explicitly and repeatedly in its opening brief (at 13–14, 35–36), but Plaintiffs neither acknowledge them nor attempt to identify any evidence that might contradict them. They instead argue (Pls.’ Response Br. 25, 30) that this Court, as well, should ignore any unfavorable evidence because Plaintiffs’ experts spent more time detailing the unique characteristics of Kool cigarettes than admitting that those characteristics are legally irrelevant. But in the 860-plus pages of expert testimony Plaintiffs repeatedly reference, they do not identify a single statement that explains why the characteristics specific to Kool cigarettes render them any more dangerous than other cigarettes. *See* Pls.’ Response Br. 25-26 (citing T. 982–90, 1009–1390, 1548–59, 1482–1960, 1985–86).² That is because their experts ultimately agreed that they do not. In doing so, they disavowed the only theory upon which the Court of Appeals found that the first jury could have validly based its strict liability product defect verdict.

Indeed, it is even worse than that. Plaintiffs attempt to rely on Dr. Burns’s testimony to the effect that B&W was part of “one of the largest public health frauds that

² Plaintiffs’ repeated reference to more than 860 pages of trial transcript is itself improper. *See Kent v. Charlie Chicken, II, Inc.*, 972 S.W.2d 513, 516 (Mo. App. E.D. 1998) (dismissing an appeal for rules violations when, among other things, the entire record consisting of 700 pages of transcript and almost 300 pages of exhibits was referenced as support for factual assertions because requiring the court to search the record would “require an inordinate amount of judicial time and resources”).

occurred in the last half century.” Pls.’ Response Br. 26 (citing T. 1082–1093 (Testimony of Dr. Burns)). But Plaintiffs ignore the point that their expert was actually making. The purported public health fraud to which Dr. Burns was referring was the very notion that qualities like relative nicotine yield according to standard machine measurements or the presence or absence of menthol make a particular brand of cigarettes less dangerous than any other. T. 1045–46, 1089. In other words, because in his view *every* cigarette is dangerous, he considered the theory that any kind of cigarette is less dangerous than another to be a fraud. If there is no such thing as a *less* dangerous cigarette, then there cannot be a *more* dangerous cigarette. And if design differences among cigarettes make no difference to their relative dangerousness, then the design characteristics specific to Kool cigarettes cannot be clear and convincing evidence of misconduct tantamount to intentional wrongdoing. Plaintiffs cannot sustain a punitive damages verdict based on a theory that their own expert not only disavowed, but denounced as a massive fraud.

Implicitly recognizing as much, Plaintiffs attempt to distract this Court with evidence that is irrelevant to the only issue that matters—*i.e.*, whether characteristics unique to Kools made them more dangerous than ordinary cigarettes and caused Ms. Smith’s injuries. As an initial matter, much of the testimony that Plaintiffs cite did not relate to the specific characteristics of Kool cigarettes at all, but rather focused on risks common to *all* cigarettes. *See, e.g.*, T. 1032–40, 1050–81, 1089–1126 (Testimony of Dr. Burns) (relying extensively on evidence regarding all instances of diseases tied to any brand of cigarettes); T. 1547–87, 1618–67 (Testimony of Dr. Wigand) (testifying at

length about same). Indeed, at one point Plaintiffs' counsel attempted to elicit testimony from Dr. Burns that "the specific design of Kool cigarettes . . . lead[s] to the unreasonable danger that you testified to the first jury." T. 1047. Dr. Burns's answer, however, reverted to invoking "the terrible disease burden that makes cigarettes unreasonable" and said nothing about any design characteristics specific to Kool cigarettes. T. 1048.

Even beyond Plaintiffs' failure to present evidence, let alone clear and convincing evidence, of Kool-specific dangers, Plaintiffs also failed to carry their burden because much of their evidence focused on issues that were irrelevant to strict liability product defect and foreclosed by the first trial.

As explained in B&W's opening brief (at 24–25), Plaintiffs could not make a case for punitive damages based on fraudulent concealment, conspiracy, failure to warn, or negligent design at the second trial because the first jury found B&W not liable for fraudulent concealment or conspiracy and the Court of Appeals held that Plaintiffs had not made a submissible case against B&W for punitive damages for failure to warn or negligent design. That is why the remand was limited "to the strict liability product defect claim *only*." *Smith I*, 275 S.W.3d at 823 (emphasis added). Nonetheless, Plaintiffs freely concede that they did not limit the second trial to evidence relating to the conduct that formed the basis for the strict liability product defect verdict, but instead "presented the same evidence" that they presented at the first trial, where they had been seeking to prove numerous other theories that were ultimately rejected. Pls.' Response Br. 24. Indeed, Plaintiffs make the remarkable assertion that notwithstanding the elimination of

four of the five claims at issue in the first trial, “[t]here was no reason . . . to deviate” in the second trial. Pls.’ Response Br. 24.

As a result, Plaintiffs effectively concede that much of the evidence presented at the second trial provided no basis for establishing aggravating circumstances for “strict liability product defect claim only.” *Smith I*, 275 S.W.3d at 823. That much is confirmed by Plaintiffs’ description of their own evidence. For example, as noted, Plaintiffs continue to point to Dr. Burns’s testimony that “Brown & Williamson’s knowledge and conduct over the past decades of the dangerous and addictive qualities of its cigarettes was ‘one of the largest public health frauds that occurred in the last half century.’” Pls.’ Response Br. 26 (citing T. 1082–93 (Testimony of Dr. Burns)). But as the Court of Appeals explained in the first appeal, “the conduct at issue is not B&W’s ‘scheme’ to lie to smokers. That alleged conduct goes to the claims of fraudulent concealment and conspiracy, *for which the jury found B&W not liable.*” *Smith I*, 275 S.W.3d at 819 (emphasis added). Just as in the first appeal, Plaintiffs cannot now point to evidence of claims for which B&W was found not liable to support a punitive damages claim for strict liability product defect. *See id.* at 814 (“Not all of B&W’s conduct is examined [to determine submissibility], as B&W was found not liable for fraudulent concealment or conspiracy.”); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (a jury may not impose punitive damages based on claims not properly before it).

Plaintiffs similarly continue to rely on evidence that bears no discernible relationship to their theory of strict liability product defect. For example, Plaintiffs point to testimony claiming that a president of B&W “had a favorite saying of ‘hook ‘em

young, hook ‘em for life,’” and that “minutes from meetings were sanitized to take out any information harmful to Brown & Williamson’s interests.” Pls.’ Response Br. 26–27. But they make no effort to explain what those allegations have to do with whether B&W acted with complete indifference to or conscious disregard for the safety of others in engaging in the only alleged conduct that could support an award of punitive damages, namely, *designing Kool cigarettes in a manner that made them more dangerous than ordinary cigarettes*.³ They instead simply maintain that this evidence is sufficient to support the punitive damages verdict because it shows that B&W engaged in *some* sort of “intentional and reckless conduct.” Pls.’ Response Br. 28. But the U.S. Supreme Court has made clear that due process requires “[a] defendant [to] be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.” *Campbell*, 538 U.S. at 423.⁴

³ Although the Court of Appeals referenced some of the same evidence Plaintiffs now cite when discussing punitive damages for strict liability product defect in both its first and second opinions, *see Smith I*, 275 S.W.3d at 822–23, *Smith v. Brown & Williamson Tobacco Corp.* (“*Smith II*”), 2012 WL 4497553, at *3–*4 (W.D. Mo. Oct. 2, 2012), that does not help Plaintiffs because the Court of Appeals also failed to explain how that evidence relates to strict liability product defect.

⁴ In contending that B&W has advanced an unpreserved due process challenge to the evidence admitted at the second trial, Pls.’ Response Br. 27, Plaintiffs misunderstand B&W’s first point on appeal. Point I assigns error based on the trial court’s finding that

That due process principle carries even more weight here because Plaintiffs did not just try to punish B&W for being “an unsavory . . . business,” *id.*; they sought to punish B&W for conduct for which it had already been found *not liable*. And there is a very good chance that the second jury did precisely that. Over B&W’s repeated objections at the second trial, the trial court not only admitted extraneous evidence not relating to the strict liability product defect claim, but also refused to impose any limitations on the manner in which the second jury could take that evidence into consideration.⁵ For example, the judge refused to inform the second jury that B&W had

Plaintiffs made a submissible case for punitive damages, because “Plaintiffs failed to present clear and convincing evidence of aggravating circumstances based on the same conduct for which the first jury could have found B&W liable.” B&W Substitute Br. 20. The due process principles B&W has highlighted simply underscore the requirement that a punitive damages verdict must be based on the same conduct for which a defendant was found liable—a legal principle that Plaintiffs do not dispute. B&W does not assert due process here as an independent basis for this assignment of error.

⁵ Plaintiffs inexplicably suggest that B&W did not properly object to the admission of this irrelevant evidence. *See* Pls.’ Response Br. 25. That is incorrect; both before and during trial, B&W repeatedly sought to preclude admission of the improper and irrelevant evidence. *See, e.g.*, L.F. 60–64, 207–18, 261–71, 333–35; T. 885–99. It is also beside the point, as B&W’s Point I argues that the evidence that *was* admitted at the second trial—correctly or incorrectly—did not make out a submissible case for punitive damages

been found not liable for fraudulent concealment or conspiracy or to instruct the jury that B&W could not be assessed punitive damages based on negligent failure to warn or negligent design. L.F. 1049, 1039. The court even refused to give the jury a withdrawal instruction that would have at least made clear that those issues were no longer part of the case. L.F. 1024–28, 1049–52. Accordingly, there is every reason to believe that the jury’s verdict (a verdict it should not have been asked to return in the first place) is a product of evidence and arguments that not only were legally irrelevant, but were an entirely improper basis for punitive damages after the first trial.

In all events, the verdict cannot possibly have been based on the same conduct for which the first jury found B&W liable because Plaintiffs’ own experts openly disavowed the only theory upon which the Court of Appeals found that the first jury could have based its strict liability product defect verdict. Because Plaintiffs did not identify any specific defect in Kool cigarettes or any characteristic that differentiated them from other cigarettes in the only respect that mattered—namely, that showed that their design made them more dangerous than other cigarettes such that B&W’s conduct in designing Kool cigarettes and selling them with that design was tantamount to intentional wrongdoing—B&W is entitled to judgment notwithstanding the verdict.

for strict liability product defect under the Court of Appeals’ first decision. Evidence focused on other claims and not relevant to strict liability product defect, by definition, cannot make out a submissible case for punitive damages for strict liability product defect.

II. PLAINTIFFS FAILED TO MAKE A SUBMISSIBLE CASE FOR PUNITIVE DAMAGES THAT WAS NOT PREEMPTED BY FEDERAL LAW. (CROSS-APPEAL POINT II)

As set forth in B&W's opening brief, Plaintiffs failed to present a submissible case for punitive damages that was not preempted by federal law, which precludes punishment based on nothing more than the manufacture or sale of ordinary cigarettes. *See, e.g., Mash v. Brown & Williamson Tobacco Corp.*, 2004 WL 3316246, at *6 (E.D. Mo. Aug. 26, 2004); *Cruz Vargas v. R.J. Reynolds Tobacco Co.*, 218 F. Supp. 2d 109, 117–18 (D.P.R. 2002), *aff'd on other grounds*, 348 F.3d 271 (1st Cir. 2003); *Conley v. R.J. Reynolds Tobacco Co.*, 286 F. Supp. 2d 1097, 1107–08 (N.D. Cal. 2002); *Insolia v. Philip Morris Inc.*, 128 F. Supp. 2d 1220, 1224–25 (W.D. Wis. 2000). Plaintiffs completely ignore both the substance of B&W's second point on appeal and these authorities that support it. They instead contend only that B&W's preemption argument is barred by the law of the case. That argument misreads the Court of Appeals' opinion in the first appeal. The Court of Appeals held in its first opinion that B&W's preemption argument failed as a factual matter based on the evidence presented at the first trial. That holding does not preclude B&W from arguing that the evidence at the *second* trial compels a different result, which is precisely what B&W argues in its second point on appeal. *See* B&W Substitute Br. 34–38.

In its first appeal, B&W argued that Plaintiffs' strict liability product defect claim was preempted by federal law because imposing liability for the mere manufacture and sale of ordinary cigarettes would conflict with the objectives of federal law, in that

“Congress . . . has foreclosed the removal of tobacco products from the market.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137–38 (2000). The Court of Appeals rejected the factual premise of B&W’s argument because it found that Plaintiffs “did more than present evidence that all cigarettes carry the same health risks”; they “demonstrated that B&W made specific design choices that had the potential to negatively impact Ms. Smith’s health.” *Smith I*, 275 S.W.3d at 798; *see also id.* at 796 (“The evidence [Plaintiffs] presented went beyond a categorical attack on the danger of cigarettes in general.”).

In this appeal, B&W makes the distinct argument that the evidence at the *second* trial cannot support such a finding. *See* B&W Substitute Br. 34–38. Plaintiffs nonetheless maintain that B&W’s preemption argument is foreclosed because Plaintiffs “presented the same evidence at the retrial” as at the first trial. Pls.’ Response Br. 25. But whether Plaintiffs offered the same exhibits or elicited the same testimony on direct examination misses the point. As explained above, Plaintiffs’ evidence in the second trial was entirely undercut by their expert witnesses’ damaging admissions *on cross-examination*. Plaintiffs’ experts openly disavowed on cross-examination the theory that Kool cigarettes are somehow more dangerous than other cigarettes, and in fact conceded that the design choices specific to Kool cigarettes do *not* make them any more dangerous than other cigarettes. *See supra* pp. 4–7. As a result, the evidentiary record in the second trial was significantly different from the record in the first trial. And it was of course only the record in the first trial that the Court of Appeals addressed in the first appeal.

Once again, Plaintiffs do not address—much less refute—the portions of the record cited by B&W demonstrating that Plaintiffs failed to establish that Kool cigarettes were more dangerous than other ordinary cigarettes. Instead, Plaintiffs simply reference evidence that purportedly details the design characteristics of Kool cigarettes. It is not enough, however, to identify design differences that did not make Kool cigarettes more dangerous. Instead, to rely on the theory adopted in the Court of Appeals’ first decision to avoid B&W’s preemption argument, Plaintiffs were required to cite evidence establishing the specific characteristics that supposedly made Kool cigarettes more dangerous than other cigarettes. Plaintiffs utterly failed to do so. The reason is clear: Plaintiffs’ own experts informed the jury that Kool cigarettes were *not* more dangerous than other ordinary cigarettes. Accordingly, the Court of Appeals’ holding that the evidentiary record from the first trial foreclosed B&W’s preemption argument as a factual matter has no bearing on the preemption argument that B&W presses here. *See Monroe v. Chicago & A.R. Co.*, 249 S.W. 644, 650 (Mo. banc 1923) (holding that a decision in a prior appeal concerning the submissibility of a claim is not law of the case when the evidence at the second trial was materially different).

In contending otherwise, Plaintiffs also largely ignore the fact that B&W is challenging as preempted by federal law the imposition of *punitive*, not compensatory, damages. As B&W explained in its opening brief (at 33), compensatory and punitive damages serve different purposes. Whereas compensatory damages are designed to make a plaintiff whole, the “well-established purpose of punitive damages is to inflict punishment and to serve as an example and a deterrent to similar conduct.” *Call v.*

Heard, 925 S.W.2d 840, 849 (Mo. banc 1996); *see also Vaughn v. N. Am. Sys., Inc.*, 869 S.W.2d 757, 759 (Mo. banc 1994) (punitive damages are awarded to “punish[] the wrongdo[er] defendant and . . . deter[] defendant and others from similar wrongful conduct in the future” (internal quotation marks omitted)). Any attempt to *punish* and *deter* an activity to which “Congress gives express sanction,” *Insolia*, 128 F. Supp. 2d at 1224, necessarily “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (internal quotation marks omitted). Accordingly, even if federal law might permit the imposition of *compensatory* damages for the manufacture or sale of ordinary cigarettes (a proposition that B&W continues to dispute), federal law forecloses the imposition of *punitive* damages for such permissible conduct.

Plaintiffs do not—and cannot—contend that the Court of Appeals actually addressed the distinct question of whether federal law permits imposition of *punitive* damages in the first appeal (or in *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 92–93 (Mo. App. W.D. 2006), the case the court cited in that appeal). They instead simply declare, without explanation, that the Court of Appeals’ rejection of B&W’s preemption argument as to the underlying *compensatory* damages award forecloses a challenge to the punitive damages award. That is a non-sequitur. The Court of Appeals could not possibly have decided whether the record in a second trial that had yet to occur would be sufficient to make a submissible case for punitive damages on a theory that was not preempted by federal law, and the Court of Appeals did not purport to do so.

In all events, the *Smith I* decision is not a holding with respect to the merits of B&W's argument that federal law preempts the imposition of damages (compensatory or punitive) based on the manufacture or sale of ordinary cigarettes. Because the *Smith I* court determined that Plaintiffs "did more than present evidence that all cigarettes carry the same health risks," it concluded that it "need not determine whether B&W's" preemption argument "is accurate" as a matter of law. *Smith I*, 275 S.W.3d at 798. Only after having already rejected the argument as a matter of fact did the court go on to posit that B&W's preemption argument would, in any event, fail as a matter of law. *See id.* Because that discussion was not necessary to the decision, it is dictum and therefore not the law of the case. *See State ex rel. Chiavola v. Vill. of Oakwood*, 931 S.W.2d 819, 823 (Mo. App. W.D. 1996); B&W Substitute Br. 34 n.9.⁶

In sum, there is no merit to Plaintiffs' claim that B&W's preemption argument is barred by the law of the case. Although B&W does not agree with the Court of Appeals' rejection of its preemption argument in the first appeal, the critical point is that in this appeal B&W presents two separate and distinct arguments: (1) that Plaintiffs failed to establish at the second trial that Kool cigarettes were more dangerous than ordinary

⁶ In *Thompson*, 207 S.W.3d at 95–96, the Court of Appeals similarly concluded that the plaintiffs' "evidence went beyond a categorical attack on the danger of cigarettes in general." Moreover, *Thompson*, like *Smith I*, did not address the separate question whether federal law precludes the imposition of *punitive* damages for the sale of ordinary cigarettes. The jury did not award punitive damages in *Thompson*.

cigarettes, and (2) that even if federal law does not preempt strict liability product defect claims based on the manufacture and sale of ordinary cigarettes, it does preempt liability for punitive damages for such claims. The Court of Appeals did not address either of those arguments in the first appeal, and for both of those reasons, Plaintiffs failed to present a submissible claim for punitive damages that was not preempted by federal law.

CONCLUSION

For the foregoing reasons, this Court should reverse and render judgment notwithstanding the verdict for B&W.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Bruce D. Ryder, hereby certify as follows:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06. The brief was completed using Microsoft Word for Windows, in Times New Roman, size 13 point font. Excluding the cover page, the signature block, and this certification of compliance and service the brief contains 5,336 words which does not exceed the 7,750 words allowed for a reply brief.
2. One true and correct copy of the attached brief was filed electronically with the Clerk of the Court, to be served by operation of the Court's electronic filing system on Susan Ford Robertson and Kenneth B. McClain this 3rd day of May, 2013.

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